82-781

NO. _____

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In The
Supreme Court of the United States

OCTOBER TERM, 1982

JOHN WHITE,

Petitioner,

v.

BOARD OF TRUSTEES OF WESTERN WYOMING COMMUNITY COLLEGE DISTRICT and MR. RON VOSIKA, in his official capacity as President of the Board of Trustees,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

QUESTIONS PRESENTED FOR REVIEW

1. Does the Wyoming Supreme Court's doctrine of "inquiry notice" conflict with principles of due process in an administrative hearing as announced by this Court in *Morgan v. United States* and its successors?
2. Is a notice of reasons for discharge of a state college professor misleading, or otherwise insufficient, (1) where the professor is charged with homosexual conduct in violation of "accepted community standards"; (2) he is discharged instead for alleged misconduct concerning alcohol and drug use, of which he had no notice, on student band tours which he supervised; and, (3) members of the administrative board which discharged him admit that the professor was not given notice that the band tour conduct was to be at issue?
3. Does failure to request a continuance preclude objection on due process grounds to surprise evidence of which there was insufficient notice?
4. Are constitutional notice requirements diminished or relaxed because discovery procedures are available to the affected party?

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Opinions Below

The majority and dissenting opinions below on the original decision, together with the denial of the motion for rehearing, are reported at 648 P.2d 528 (Wyo., 1982). They are appended hereto at Appendix A. At Appendix B is the "Order Denying Relief Requested by Petition for Review" entered by the intermediate court which reviewed the decision of the administrative agency in this case. At Appendix C is the "opinion" of the administrative agency, specifically the "Findings of Fact and Conclusion of Law", of the Board of Trustees of Western Wyoming Community College, State of Wyoming.

Jurisdiction

The order sought to be reviewed was made and entered on July 20, 1982. An order denying a timely motion for rehearing was made and entered on August 9, 1982. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Section 1257(3).

Constitutional Provision Involved

Amendment XIV, United States Constitution, Section 1, Clause 2: ". . .; nor shall any State deprive any person of . . . property without due process of law; . . ."

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

Statement of the Case

This appeal arises from the Respondents' termination of Petitioner's employment contract as a professor of music at Western Wyoming Community College in Rock Springs, Wyoming. It is undisputed that the Petitioner was deprived of a property interest entitled to due process protection under the Fourteenth Amendment to the United States Constitution.

When informed that the college president was recommending termination of his employment contract, Petitioner requested a statement of the reasons for his

termination and a formal hearing before the Respondent Board of Trustees. He was given written notice of seven charges against him, none of which mentioned conduct on band tours supervised by him. When the hearing was conducted, evidence was introduced concerning alleged misconduct on such band tours, notice of which misconduct had not been included in the statement of charges. Over Petitioner's strenuous objections the Repondents admitted evidence concerning the band tours then terminated Petitioner's employment contract expressly on the grounds of the alleged band tour misconduct.

The chronology of events and the facts concerning notice commenced on July 11, 1980, when Petitioner, Dr. John White, hereinafter "Dr. White", was called to the office of the Western Wyoming Community College President, Dr. Slafter. The president stated that parents of a student had complained about Dr. White's relationship with their son, and alleged that Dr. White had written letters which were evidence of homosexual desires toward the student.

On July 25, 1980 Dr. White was served with written notice of the president's recommendation to the Board of Trustees that Dr. White's teaching contract be terminated. On August 12, Dr. White requested notice of the reasons for the proposed termination of his contract and requested a hearing. Dr. Slafter then served "Notice of Reasons for Termination Recommendation and Notice of Hearing", dated August 29. That notice set forth seven specific charges of unsatisfactory conduct alleged against Dr. White, but made no mention whatsoever of any conduct on band tours.

Of the seven reasons specified in the notice, the single ground for termination eventually relied on by the Board in its decision to terminate Dr. White's contract appeared in the notice as charge #7:

> Soliciting and participating in relationships with students in a manner which is violative of generally accepted community standards.

Due to the vagueness of the terminology used in that charge, Dr. White requested a more definite statement of charge #7. By letter dated September 15 he asked that Dr. Slafter provide him with a

> copy of the policy governing student/teacher relationships at Western Wyoming College. Please emphasis [sic] the description of relationships disallowed that I have allegedly violated.

In response thereto, by letter also dated September 15, Dr. Slafter delivered to Dr. White several documents that would be used at the hearing and reiterated the nature of the hearing and the reasons for termination. The letter corroborates Dr. White's uncontradicted testimony that Dr. Slafter clearly defined the term "improper student relationships" in charge #7 as a charge of homosexual conduct with students, originally alleged to have been with a student named Wilkinson to which was added the allegation of a relationship with a student named Meehan:

> Dear Dr. White:
>
> Appended hereto are written statements furnished by Christopher Meehan, Earl Starks, and Jean Zueck at my request, and received by me on the date noted.
>
> You are hereby advised that these statements will be used as evidence during your hearing. Additionally, it is the intention of the Administration to call Mr. Meehan, Mr. Starks, and Mrs. Zueck as witnesses at that hearing. You should transmit these documents to your attorney at the earliest possible opportunity.
>
> I trust that copies of letters addressed to Mike Wilkinson served upon you earlier, together with the enclosed statement of Mr. Meehan, will suffice to meet with your request of this date that I "emphasis (sic) the description of relationships disallowed that I have allegedly violated."

I am also enclosing a copy of a computer printout evidencing your college housing rental delinquencies for the months of July and August 1980.

Yours truly,
[signed]
Bert Slafter, Ed.D.
President

That letter and the supporting document from Mr. Meehan, together with the Wilkinson letters identified previously, specified factual allegations of homosexual conduct in support of charge #7. Neither in Dr. Slafter's letter nor in any of the supporting documents was there any mention whatsoever that Dr. White was charged with alcohol or drug use, or any other improper conduct, on band tours. By further letter, dated September 17, Dr. White requested additional clarification:

Bert,

I would appreciate ALL the evidence against me at the earliest convenience. Your bringing these strange reports out of the woodwork and trickling them to me hardly serves to bring a timely end to this nonsense.

No, my letters addressed to Mike Wilkinson do not suffice to meet my request for a description of the Western Wyoming College Policy regarding student/teacher relationships. Nor does the statement from Mr. Meehan.

Please excuse the ommission of the "e" from emphasise [sic].

/s/JDW

The fact that termination was based *solely* on band tour conduct, and not on the alleged homosexual incidents of which Petitioner was given notice, is clearly stated at paragraphs 6 through 18 of the Board's "Findings of Fact and Conclusion of Law" attached hereto as Appendix C.

FEDERAL CONSTITUTIONAL QUESTION

The federal constitutional question herein was raised during the administrative hearing by timely objection at the first instance when the state offered evidence of matters outside the scope of the notice to Petitioner; the objection was overruled:

> MR. ARON [Counsel for Petitioner]: Your Honor, we would like to further interject an objection on the same basis that *any such testimony will be violative of Dr. White's due process rights because he was not given notice of any conduct other than what was in this notice of termination.*
>
> It's enough to have to prepare for these seven dubious allegations. This essentially is additional allegations for which he was not given notice. . . .
>
> * * *
>
> MR. ARON: I'd like to say that summarizes the whole situation here. What the University or the College is trying to do is place the burden on Dr. White to make his own case against himself. That is not what these rules say. The rules say that he must be given notice, *the substance of due process is to be told what you're accused of and have a chance to respond. You don't have to seek out what they might want to accuse you of.* That's not included. It's hard enough to prepare for seven allegations with a specific date. I don't believe it's within the wildest realms of due process to have to respond to something that's outside that scope.
>
> * * *
>
> Mr. CHAIRMAN: I think we do, and I think we'll overrule by reason presented by Mr. Combs, our attorney.
>
> [Transcript pp. 48-51.] [Emphasis supplied.]

The constitutional question was again raised in the Petition for Review of Administrative Action, filed in the District Court for Sweetwater County, Wyoming, at pages 1 and 2 of said petition:

That the grounds upon which Petitioner contends he is entitled to relief are as follows:

a. Deprivation of property without due process of law; specifically, Petitioner has been deprived of his right to employment under a valid employment contract by the decision of this Board. Petitioner was deprived of said property right without proper notice to him, hence, without opportunity to prepare a defense against the grounds alleged, without the opportunity to make proper discovery of the matters on which the decision was based, and therefore, without a proper due process hearing, all of which constitutes denial of the rights guaranteed to Petitioner pursuant to the Wyoming Administrative Procedures Act, the Wyoming Constitution, and the Constitution of the United States of America.

The reviewing court ruled on the constitutional issue by holding that "Petitioner was not denied due process of law." [App. B, p. 53.]

The constitutional question was again raised in the appeal to the Wyoming Supreme Court, in the Docketing Statement at page 2:

QUESTIONS ON APPEAL

1. Whether the "Notice of Reasons for Termination" given to Appellant on August 29, 1980, was adequate to satisfy minimum Due Process requirements.

The most concise statement of the ruling by the Court below on the due process issue is in the dissenting opinion of Mr. Chief Justice Rose:

In concluding that the notice was adequate, the majority of the court establish a standard that the notice requirements [of the Administrative Procedure Act], were satisfied by whatever places a party on "inquiry". The majority say that once the party has been placed on "inquiry", the burden then shifts to him or her to ferret out the essence and the details of the charges. The court

goes on to say that the appellant here did not satisfy this obligation in this case. For me, the holding flies in the face of past standards established by this court and I am therefore compelled to express my disagreement.

[App. A, pp. 40-41.]

POINT I

The doctrine of "inquiry notice" announced by the Wyoming Supreme Court conflicts with the due process clause of the Fourteenth Amendment as construed by this Court.

We are not unmindful that the Wyoming Supreme Court expressly recognized that the due process clause of the 14th Amendment to the United States Constitution prohibits a State from terminating a protected interest unless the affected party is first afforded notice of the charges or claims against him. [App. A, pp.32-33.] The error below arises from the novel holding by the Wyoming Supreme Court that in administrative proceeding a notice satisfies constitutional due process requirements if it puts the affected party on "inquiry" to discover the precise charges against him:

> [T]he law is elementary that whatever puts a party on inquiry amounts to "notice,". . . Appellant was put on inquiry when he was advised that names of witnesses would be furnished upon request, along with being furnished copies of pertinent school regulations dwelling primarily on the use of alcohol and drugs.
>
> [App. A, pp. 34-35.]

This doctrine of "inquiry notice" conflicts with fundamental constitutional precepts of due process which this Court has firmly and repeatedly articulated. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18; *accord, Roller v. Holly*, 176 U.S. 398; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292; *Greene v. McElroy*, 360 U.S. 474; *Bell v. Burson*, 402 U.S. 535; *Perry v. Sindermann*, 408 U.S. 593.

The Wyoming Supreme Court deviated from these principles in evaluating the notice which was afforded to the

Petitioner; in so doing it relied on a concept of "inquiry notice" which it had declared previously in contexts not of constitutional dimensions. One case concerned the timeliness of filing a petition for review of administrative action where the issue was whether the affected party was on notice that the time for appeal was running; in another, the issue was whether the holder of a municipal bond redeemable after a certain date was on inquiry, and therefore was on notice, to determine whether such a call for redemption was made. *Stagner v. Wyoming State Tax Commission*, 642 P.2d 1296 (Wyo., 1982); *Rodin v. State, ex rel. City of Cheyenne*, 417 P.2d 180 (Wyo., 1966). In the context of constitutional due process standards, however, the "inquiry notice" doctrine directly conflicts not only with the decisions of this Court, but also with the numerous holdings of the federal District Courts and Courts of Appeals which have applied due process standards of notice in diverse situations. *Billington v. Underwood*, 613 F.2d 91 (5th Cir., 1980); *Robbins v. United States Railroad Retirement Board*, 594 F.2d 448 (5th Cir., 1979); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir., 1977); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir., 1976); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir., 1970); *Rodale Press, Inc. v. F.T.C.*, 407 F.2d 1252 (D.C. Cir., 1968); *Johnson v. San Jacinto Junior College*, 498 F. Supp. 555 (S.D. Tex., 1980); *C & C Market, Inc. v. United States*, 473 F. Supp. 519 (E.D. Mo., 1979). The courts of other states have applied the constitutional mandates without difficulty. *See e.g., Snyder v. Civil Service Commission*, 238 S.E.2d 842 (W.Va., 1977).

POINT II

As announced and applied by the Wyoming Supreme Court, the due process standards used to determine whether a notice of charges is misleading are in direct conflict with previous decisions of the federal Courts of Appeals.

The holding of the Wyoming Supreme Court that the notice given to the Petitioner was not misleading [App. A, p. 33.], directly conflicts with the decisions of federal courts which have applied constitutional due process principles to analagous fact situations, in the cases cited above and in others. For example, in *Rodale Press, Inc. v. F.T.C.*, 407 F.2d 1252 (D.C. Cir., 1968), the Court of Appeals for the District of Columbia Circuit held that where an agency changes the theory of its case the burden is on the agency to give notice of such changes, not on the affected party, to discover unexpected changes which might arise. In a subsequent case, *Rodale Press* was applied to a situation where an administrative decision was made on the basis of different facts than those set forth in the notice to the affected party rather than on the basis of a different theory. "Having notified the parties of 'the matters of fact and law asserted', an agency cannot substitute new facts and theories unless it first gives parties reasonable notice. (citations omitted)" *C & C Market, Inc. v. United States*, 473 F. Supp. 519, 525 (E.D. Mo., 1979).

The misleading effect of the notice provided to the Petitioner herein arises from the fact that he was given specific notice of seven charges but then terminated for a different one. When the theory and factual basis for one of the charges was changed without notice to him, the Petitioner was misled into preparing a defense against the original charges. The Ninth Circuit Court of Appeals recognized the misleading effect of such a red herring notice in *Albert v. Chafee*, 571 F.2d 1063 (9th Cir., 1977), the reversal of a decision to terminate a civil service employee. The affected party did receive notice of certain charges; nevertheless, the administrative action was held to have been based on insufficient notice of charges even though the discharge was based on the same type of acts (misuse of a government vehicle), which occurred on the very same date

as the acts which the notice charged. In contrast, as regards the Petitioner herein, the acts on which the discharge was based were entirely different from the charges of which he was given notice, not only in regard to the type of violation alleged (band tour conduct rather than homosexual acts), but also in regard to dates, locations, and individuals involved.

The record herein indicates not only that the notice was misleading, but also that there might have been intentional deception by the college administration. The acts of the administration indicate bad faith in three respects: (a) The primary evidence of which Petitioner was given notice, and which motivated the administration to take action, was not even offered at the hearing. (b) After the notice of termination, Petitioner supervised two additional band tours with no restrictions upon him and no notice to him that the previous tours had been unsatisfactory. (c) Supposedly to support the charges noticed on August 29, the administration offered evidence of conduct on a band tour which did not occur until October.

Whether or not the Respondents intended to mislead Petitioner about the charges against him, the deception could not have been greater if it had been planned.

POINT III

The affected party does not waive his right to a notice of charges by his failure to request a continuance when he is confronted with surprise evidence concerning charges not included in the notice to him.

In reliance on Rule 15(b), Wyoming Rules of Civil Procedure, which is substantially the same as the federal rule and is set out in Appendix A at page 48 the Wyoming Supreme Court held that "Even if the Petitioner genuinely

felt that he was surprised by the evidence and it was not reflected in the charges, failure to request a continuance on the grounds of surprise precludes him from now contending that he was prejudiced." [App. A, p. 35]

Since the unpleaded issues were considered over Petitioner's objection as described above, hence were not tried by consent of the parties, the Wyoming Supreme Court's convoluted application of the rule violates each procedural requirement contained therein: the Respondents never requested, therefore were never allowed, to amend the pleadings; hence, the Petitioner had no opportunity to request a continuance "to meet such amendment".

Under such circumstances, this Court should consider whether a court can deem a person to have waived his constitutional due process rights by implication. Such an interpretation of due process would appear to conflict directly with this Court's decisions in *Morgan v. United States, supra*, and *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306.

POINT IV

Where the administrative board makes no finding concerning sufficiency of notice, the reviewing court must accept as conclusive the admission by board members that sufficient notice was not given.

The fact that Petitioner never received notice of the conduct on the band tours as a reason for his termination is apparent from the contrast between the notices themselves and the dissimilar findings; in addition, members of the Board admitted that the decision to discharge Petitioner was not based on the conduct about which he had received notice. The Board Chairman, Mr. Vosika, stated in regard to charge #7:

Seven does have ambiguities. I'll admit that. I'll say that for myself. The rest of the Board members may not feel that way, but *I'm not going by the allegations, the charges.*

[Transcript p. 501.] [Emphasis added.]

At one point, one of the Board members recognized the unfairness of the failure to give proper notice to Petitioner. The Chairman and the counsel for the Board then came right out and admitted that the discharge was not based on the charges presented:

MS. GRANDEY: I have another question.

MR. CHAIRMAN: Yes?

MS. GRANDEY: *Doesn't that have to be included in the bill of particulars against [Petitioner]?*

MR. CHAIRMAN: You're into a legal area where I'll have to admit I don't know. Would you want to comment on that, Counsel? You certainly don't have to.

MR. COMBS: Well, it's my opinion, as Counsel for the Board, that item #7 in Mr. Slafter's letter encompasses allegations of breach of contract. There is a contention made by the [Petitioner] that upon further explanation of allegation #7 the breach of contract was not included, as well as misconduct on the tours. I don't have an answer for that. . . . *There are no statements in that letter that misconduct on tours or breach of contract will be a point of contention.*

* * *

MR. CHAIRMAN: The point being, Pat, that if in fact the charges were not legally admissible or whatever, that *based on what we've heard outside of the specific charges or included in the ambiguous charge*, I probably would instruct or ask Dr. Slafter if we dismiss this to immediately turn around tomorrow and re— and again ask for the resignation of Dr. White. Just because *things came out that are not specifically included in the charges*, I don't believe, in a Board of Hearing, as we are, that we have the right to close our eyes to them.

[Transcript pp. 502-504.] [Emphasis added.]

POINT V

The availability of discovery procedures does not diminish constitutional notice requirements.

The Wyoming Supreme Court concluded that the availability of discovery procedures, taken in conjuction with that Court's "inquiry notice" doctrine, shifted the burden to the Petitioner to ascertain the charges against him. The majority concluded that since Petitioner had been given the opportunity to obtain the names of the witnesses to be used against him, and since the record did not reflect any formal discovery by the Petitioner, therefore the Petitioner did not prepare his case well enough to obviate the surprise effect of the evidence presented against him. [App. A, pp.33-35.]

As a pure constitutional due process issue, the Wyoming Supreme Court's holding conflicts with decisions of this Court which have recognized the prejudicial effect of a procedure which results in shifting the burden of proof from the agency to the affected party. *Armstrong v. Manzo*, 380 U.S. 545. In addition, the Wyoming Supreme Court's analysis demonstrates a lack of understanding of trial preparation and of the adversary process. In this modern legal era, characterized by discovery abuse and severe delay in litigation, a court might be expected to commend rather than to punish informal discovery, witness interviews, and other forms of trial preparation which do not appear on the record. Furthermore, armed with the name of a witness, a litigator who conducts the most extensive witness interview and the most thorough deposition would have no reason to obtain information about issues outside of the pleadings. It is difficult enough to prepare thoroughly for seven specific charges. There is little reason for a litigator then to inquire into and seek out— and by doing so very likely to encourage — additional unrelated charges against his client.

Mr. Justice Thomas of the Court below, in his specially concurring opinion, discussed the practical effect on trial preparation of an unfair, inadequate notice of charges:

> One of the prerequisites of a fair hearing is that the accused individual be appraised of the charge which is brought against him so that he may have an adequate opportunity to defend. The admission into evidence of misconduct which is not alluded to in the notice, even though no apparent reliance is placed upon such evidence in the findings of fact made by the hearing body, deprives the respondent of an opportunity for a fair hearing. It well may be that the [Petitioner] could refute the evidence of extraneous misconduct, but did not come prepared to do so because there was no reason apparent from the notice to be prepared to meet such information.
>
> [App. A, pp. 39-40.]

POINT VI

This Court's past decisions indicate that it should grant review to determine whether a proper due process notice of certain charges can be used by an administrative agency as a pretext by which to deny a person the right to prepare a defense against additional charges.

This Court has previously considered the due process question of notice in varied situations where a person has received a notice which was adequate to apprise him of some aspects of a judicial, legislative, or administrative proceeding against him, but which under the circumstances was not reasonably calculated to permit adequate preparation of a defense. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306; *Groppi v. Leslie*, 404 U.S. 496; *Arnett v. Kennedy*, 416 U.S. 134; *Goss v. Lopez*, 419 U.S. 565; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1. This Court should consider whether its previous holdings apply where a state as employer discharges an employee through an administrative hearing held before a board of

laymen trustees, well-intentioned but without understanding of constitutional due process rights.

CONCLUSION

At the heart of the matter is one pristine fact, striking to the very essence of due process: the State of Wyoming took John White's employment without giving him the opportunity to defend himself. Mr. Chief Justice Rose, in his dissenting opinion below summarized the situation and reached the conclusion which should stimulate this Court to review the case:

> So the real question, for me, concerns whether or not [Petitioner] was given adequate notice by the board to the effect that he would be expected to defend against allegations surrou[illegible]g his conduct on school band trips under Charge No. 7. I conclude that he was not and that the board's failure to respond to his demands for a more detailed statement was reversible error. . .
>
> * * *
>
> [O]n the administration's own admission, the charge relating to impermissible relationships violative of community standards (Charge No. 7) was narrowed to issues surrounding the alleged homosexual preference of the [Petitioner]. No mention or reference was made to any conduct on band trips. Notwithstanding this, on September 18, 1980, [Petitioner] once again requested further clarification concerning specific college policies on student-teacher relations which the administration believed he had violated. He received no response to this request.
>
> Up to that time, the [Petitioner] had received no specific information concerning alcohol or drug use except for various copies of college regulations regarding the use of alcohol and drugs in college facilities. No specifics regarding [Petitioner's] alleged activities with drugs or alcohol were ever communicated to him even though he

made two requests for further clarification. The only specific notice he ever received concerning Charge No. 7 had to do with alleged homosexual relationships with students.

Given these facts, I can reach no other conclusion but that [Petitioner] was never given adequate notice of the specific charges which formed the basis of the board's decision, even though he had made several requests for that information. . . . [T]he facts clearly required reversal of the board's decision since [Petitioner's] statutory. . . and constitutional due process rights were violated.

[App. A at pp.44-45.]

Although its doctrine of "inquiry notice" is a novel one, its effect of eroding the constitutional protections afforded to an individual's property rights is not unprecedented. Nearly four decades ago Dean Pound noted both the historical foundations of our fundamental due process precepts and the ongoing attempts to revise them:

Other ideas urged recently are that to those who drafted the constitutional provisions liberty meant only freedom from imprisonment and due process of law meant only procedural regularity. But the terms "liberty" and "due process" were legal terms with well-understood meanings known to lawyers; and when one notes the names of the great lawyers who signed the original Constitution — one future Chief Justice and two future Justices of the Supreme Court of the United States, a Chief Justice of New Jersey, and many who were then accounted leaders of the profession, it is idle to assume that they did not know the significance of the words they used.

R. Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY, at 109-110 (1957).

This Court should grant certiorari, and the judgement below should be reversed.

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